ELIZABETH FLESHER
(Appellant)

v.

INLAND HOSPITAL
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argued: August 20, 2020
Decided: February 28, 2022

PANEL MEMBERS: Administrative Law Judges Stovall, Chabot, and Pelletier
By: Administrative Law Judge Pelletier

[¶1] Elizabeth Flesher appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Elwin, ALJ*) issued after a remand, denying her Petitions for Award and for Payment of Medical and Related Services on the basis that she failed to provide Inland Hospital with adequate notice of her injury pursuant to 39-A M.R.S.A. §§ 301 or 302. Ms. Flesher contends that the evidence compels a finding that, by requesting alternate job duties in the context of advising the Hospital of her increasing back pain, she provided the Hospital with sufficient information that her back injury might be work-related and therefore compensable. We affirm the decision.

I. BACKGROUND

[¶2] In a decision issued in July of 2019, a separate panel of the Appellate Division remanded this case for additional findings of fact and conclusions of law on the issue of notice. *Flesher v. Inland Hospital*, Me. W.C.B. No. 19-25 (App. Div. 2019). The ALJ rested her prior decision that Ms. Flesher had provided adequate notice to the Hospital on two specific findings: (1) that Ms. Flesher had told her supervisor that her work performing file retrieval in the records room "was causing her increased back pain, and [she] was assigned a different task doing data entry at a computer"; and (2) when Ms. Flesher told the human resources representative at the hospital that she was not making a workers' compensation claim because she had a preexisting back condition, the supervisor "presumably understood" that a preexisting condition did not preclude a claim, and thus the Hospital had adequate knowledge that Ms. Flesher was asserting a workers' compensation claim.

[¶3] The appellate panel determined that the second finding constituted conjecture unsupported by competent evidence, and remanded the case for additional findings to clarify whether the first finding alone supported the decision that Ms. Flesher provided timely notice of her claim.

[¶4] On remand, the ALJ reviewed the record and concluded that the evidence did not support an inference that Ms. Flesher told the Hospital that her back condition may have been work related when she asked to be reassigned. The ALJ thus

concluded that Ms. Flesher had failed to satisfy her burden of proof on the issue of notice, and denied the petitions. This appeal followed.

II. DISCUSSION

[¶5] Ms. Flesher contends that the evidence as a whole compels the inference that the Hospital had timely knowledge that her increasing back pain was related to her work when she requested and was granted a change from the file-retrieval job to seated computer work.

[¶6] The role of the Appellate Division "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted).

[¶7] Pursuant to 39-A M.R.S.A. § 301, Ms. Flesher was required to provide notice of her work injury to the employer within 90 days of the date of injury. However, "[w]ant of notice is not a bar to proceedings under this Act if it is shown that the employer or the employer's agent had knowledge of the injury." 39-A M.R.S.A. § 302. Ms. Flesher, as the petitioning party, bore the burden of proof on the issue of notice. *Boober v. Great N. Paper Co.*, 398 A.2d 371, 373 (1979).

[¶8] The ALJ was specifically directed on remand to consider the Law Court's decision in *Farrrow v. Carr Bros. Co*., 393 A.2d 1341 (Me. 1978). In

Farrow, the Court stated that the notice provision requires the injured employee to state the cause of disability, and this requirement means more than "informing the employer of the mere fact of an injury; the employer must also receive some indication that the injury might be work related and therefore compensable." *Id.* at 1344.

[¶9] Applying this standard to the evidence, the ALJ concluded that as in *Farrow*, there was no basis on which to conclude that the Hospital received some indication that Ms. Farrow's back condition might be work related. The ALJ reconsidered the initial inference that Ms. Flesher had likely told her supervisor in the records room that her work in the file room was the cause of her increased back pain when she requested a different assignment. Instead, the ALJ determined that based on Ms. Flesher's testimony, it was equally possible that "Ms. Flesher simply told [the supervisor] that her back was bothering her (without explaining why) when she asked for a new assignment and later said she could not continue working."

[¶10] Ms. Flesher contends this was error, citing *Gelinas v. Central Me. Power*, Me. W.C.B. No. 19-26 (App. Div. 2019). In *Gelinas*, the ALJ found that the employee had informed the employer of his back pain in connection with reporting a faulty seat in his work truck, even though the employee did not explicitly so testify. *Id.* ¶ 10. The Appellate Division held, based on the employee's entire testimony, that the ALJ made a reasonable and logical inference that the employee had informed his

supervisor that the seat was the source of his back pain. *Id.* The panel reasoned that the inferred factual findings were "logically . . . drawn from proof of other facts." *Id.* ¶ 9 (quoting *Murray v. T.W. Dick Co.*, 398 A.2d 390, 392 (Me. 1979)).

[¶11] As the party with the burden of proof, Ms. Flesher had to produce competent evidence showing on a more likely than not basis that she timely communicated to the Hospital that her increased back pain might have been caused by her work. There is no direct evidence of such communication in the record. Based on her review of Ms. Flesher's testimony on remand, the ALJ determined that she could not infer that Ms. Flesher told the Hospital that her back pain might be work related. Instead, she found it equally possible from the evidence that Ms. Flesher did not explain why her back was hurting her when she asked for a new assignment.

[¶12] It is within the province of the ALJ as fact finder to decide the weight of the evidence and to make reasonable inferences therefrom. *Boober*, 398 A.2d at 375 & n.10. Moreover, "[a]n inference must be based on probability and not on mere possibilities or on surmise or conjecture and must be drawn reasonably and supported by the facts upon which it rests." *Murray*, 398 A.2d at 392 (quotation marks omitted). The ALJ was not compelled to infer that Ms. Flesher told her supervisor that her back pain was work related when she asked to be reassigned.

[¶13] Ms. Flesher next contends that the Hospital was in possession of sufficient knowledge of her claim because Ms. Flesher requested and received an

accommodation of her duties from the Hospital just prior to going out of work, and the Hospital's human resources representative asked her if she wished to pursue a workers' compensation claim in a phone call shortly after Ms. Flesher did not report to work. This, Ms. Flesher asserts, would indicate to a "reasonably conscientious manager that the case might involve a potential workers' compensation claim." *Farrow*, 393 A.2d at 1344 n.6 (quoting 3A LARSON, WORKMEN'S COMPENSATION LAW § 78.31(a) (1976)).

[¶14] Although in some circumstances a work-related cause may be inferred from proof of facts connecting the injury with the employment, we cannot say that Ms. Flesher's testimony compels such an inference in this case. The ALJ, after reviewing the facts on remand, stated: "Given Ms. Flesher's long history of back pain, and her own belief that this pre-existing condition precluded her from claiming a work injury with Employer, the Board cannot infer that Ms. Flesher told her supervisor that her work in the records room was aggravating her back symptoms."

[¶15] The evidence in the record supports the ALJ's legal conclusion that Ms. Flesher did not establish that, in addition to informing the Hospital that she suffered from back pain, she also informed the Hospital that she connected the back pain to her work duties. The ALJ stated:

> Like the employee in *Farrow*, Ms. Flesher informed her supervisor that she was having back problems and needed to be assigned different tasks, and later that she was unable to work. But, as in *Farrow*, Ms. Flesher did not explicitly inform her supervisor, or the human resources

representative that she believed her back problems might be caused by her work for Employer.

[¶16] The record supports the finding that Ms. Flesher did not establish on a more probable than not basis that she gave her supervisor or the human resources representative some indication that she believed her back problems might be work related or that the Hospital had knowledge of the work-related nature of her condition.

III. CONCLUSION

[¶17] On remand, the ALJ neither misconceived nor misapplied the law when determining that Ms. Flesher did not establish that she provided timely notice, and the factual findings are supported by competent evidence. Accordingly, we affirm the decision.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322.

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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